Toh Puan D Heryati bt Abdul Rahim v Lau Ban Tin & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-80–07 OF 2017(W)
AHMAD MAAROP PCA, RAMLY ALI, AZAHAR MOHAMED, AZIAH ALI AND ALIZATUL KHAIR FCJJ
15 MAY 2019

Limitation — Land — Claim for transfer of — Whether plaintiff's claim for recovery of land or for breach of promise concerning the land — Plaintiff sold her shares in company to defendants inter alia on latter's undertaking that when company was alienated land by state government they would 'cause the company to transfer' the land to her absolutely — Six years after undertaking was made plaintiff discovered land was registered in company's name and then transferred to one of the defendants — Plaintiff waited another nine years before suing defendants for transfer of the land to her or alternatively to pay her damages for breach of undertaking — Plaintiff was aware at time of filing action that land had been transferred to third parties but did not cite them as parties to the action — Whether nature of claim and facts and circumstances of case showed plaintiff's claim not for recovery of land but for breach of undertaking — Whether plaintiff's claim time-barred under s 6 of the Limitation Act 1953

The appellant was one of two shareholders of a company which had applied to the state authority to be granted a piece of land ('the land'). On 20 June 2000, the shareholders entered into an agreement ('the SSA') to sell 60% of the company's shareholding to the respondents. The SSA, which involved the sale of the appellant's entire shareholding, contained a clause ('section 2.05') which stated that in consideration of the sale of the shares plus a further RM1 payable by the appellant, the respondents would 'cause the company to transfer' the land to her absolutely. At the time the SSA was executed, the title for the land was not yet issued. It was only issued in 2003 and when the appellant did a search on the land in December 2005, she discovered that the land was initially registered in the name of the company before being transferred to the first respondent ('Lau'). In January 2006, the appellant sent a letter, enclosing a cheque for RM1, to the respondents requesting them to transfer the land to her in compliance with section 2.05. There was no response from the respondents and the appellant did nothing until September 2014 when her solicitors issued a letter of demand to the respondents, again requesting that they comply with section 2.05. At the time the letter of demand was issued, the appellant was aware that Lau had transferred the land to third parties. As there was no response to her letter of demand, the appellant applied to the High Court for an order that the respondents register the land in her name; alternatively, that they pay her damages, as assessed by the court, for their breach of section 2.05.

The issue before the trial court was whether the appellant's claim was for recovery of the land (in which case, the limitation period was 12 years under the Limitation Act 1953 ('the LA')) or whether her claim was for breach of contract (in which case the limitation period was six years). The High Court found that the appellant's claim was not for recovery of the land but for breach of the respondents' undertaking under section 2.05; that even though she was aware of the breach in 2005/2006, she only filed her action against the respondents in 2015 and was therefore time-barred under s 6 of the LA. The Court of Appeal ('the COA') upheld the decision and rejected the appellant's contention that her claim was for recovery of the land. The COA found that: (a) when the appellant filed the action, she knew the land was not in the names of the respondents but had been transferred to third parties who were not cited as parties to the action; and (b) the respondents' obligation under section 2.05 was only to 'cause the company to transfer' the land to the appellant and not to personally transfer the land themselves since the land did not belong to them. The instant appeal was against the COA's decision.

Held, unanimously dismissing the appeal and affirming the decisions of the courts below:

(1) The appellant's claim was not based on any contract for the sale and purchase of land but on an undertaking under section 2.05 of the SSA. Her claim was based on the breach of undertaking by the respondents to 'cause the company to transfer' the land to her, which the appellant claimed should have been done when the title to the land was obtained. The appellant agreed that she did not do anything from 2006 (when her solicitors issued a letter, together with a cheque for RM1 as consideration, to the respondents requesting them to comply with section 2.05) to 2014 (when her solicitors issued a letter of demand to the respondents). She said she was waiting for the respondents to fulfill their undertaking. More importantly, when she issued the notice of demand in 2014, she knew that the land had been registered in the names of Tengku Mohd Kamil and Tengku Ramli. Despite this, when she filed her claim she did not cite them as parties. If she had wanted the land, the appellant should have sued Tengku Mohd Kamil and Tengku Ramli. She did not do so. What she did was to apply to court for an order that the respondents register the land in her name; alternatively, that they pay her damages as assessed by the court (see para 23).

(2) Upon considering the nature of the appellant's claim and the facts and circumstances of the case, the appellant's claim was not for recovery of land but was for breach of the undertaking by the respondents under section 2.05 of the SSA. Her claim was in effect a claim for breach of contract for which the limitation period was six years. Her claim was therefore barred by the Limitation Act 1953 (see para 24).

[Bahasa Malaysia summary

Perayu adalah salah seorang pemegang saham syarikat yang telah memohon kepada pihak berkuasa negeri untuk diberikan sebidang tanah ('tanah tersebut'). Pada 20 Jun 2000, pemegang-pemegang saham tersebut telah memasuki perjanjian ('SSA') untuk menjual 60% daripada pegangan saham syarikat kepada responden-responden. SSA tersebut, yang melibatkan jualan keseluruhan pegangan saham perayu, mengandungi suatu fasal ('s 2.05') yang menyatakan bahawa sebagai balasan jualan saham tersebut dan juga selanjutnya RM1 yang kena dibayar oleh perayu, responden-responden akan 'cause the company to transfer' tanah tersebut sepenuhnya kepadanya. Pada masa SSA disempurnakan, hak milik tanah tersebut maih belum dikeluarkan. Ia hanya dikeluarkan pada 2003 dan apabila perayu membuat carian ke atas tanah tersebut pada Disember 2005, dia mendapati bahawa tanah tersebut pada mulanya telah didaftarkan atas nama syarikat itu sebelum dipindah milik kepada responden pertama ('Lau'). Pada Januari 2006, perayu telah menghantar surat, dengan melampirkan cek untuk RM1, kepada responden-responden memohon mereka memindah milik tanah tersebut kepadanya bagi mematuhi seksyen 2.05. Tiada jawapan daripada responden-responden dan perayu tidak berbuat apa-apa sehingga September 2014 apabila peguam caranya mengeluarkan surat tuntutan kepada responden-responden, sekali lagi meminta mereka mematuhi seksyen 2.05. Pada masa surat tuntutan dikeluarkan, perayu menyedari bahawa Lau telah memindah milik tanah tersebut kepada pihak ketiga. Oleh kerana tiada jawapan kepada surat tuntutannya, perayu memohon kepada Mahkamah Tinggi untuk perintah agar responden-responden mendaftarkan tanah terseut atas namanya; secara alternatif, agar mereka membayar ganti rugi kepadanya, sebagaimana ditaksirkan oleh mahkamah, disebabkan pelanggaran mereka kepada seksyen 205. Isu di hadapan mahkamah perbicaraan adalah sama ada tuntutan perayu untuk mendapat balik tanah tersebut (dalam kes ini, tempoh had masa adalah 12 tahun di bawah Akta Had Masa 1953 ('AHM') atau sama ada tuntutannya adalah untuk pelanggaran kontrak (dalam kes ini tempoh had masa adalah enam tahun). Mahkamah Tinggi mendapati bahawa tuntutan perayu adalah bukan untuk mendapat balik tanah tersebut tetapi untuk pelanggaran akujanji responden-responden di bawah seksyen 2.05; bahawa meskipun dia menyedari tentang pelanggaran itu pada 2005/2006, dia hanya telah memfailkan tindakannya terhadap responden-responden pada 2005 dan dengan itu telah luput had masa di bawah s 6 AHM. Mahkamah Rayuan ('MR') telah mengekalkan keputusan tersebut dan menolak hujah perayu bahawa tuntutannya adalah untuk mendapat balik tanah tersebut. MR mendapati bahawa: (a) apabila perayu memfailkan tindakan itu, dia mengetahui tanah tersebut bukan atas nama responden-responden tetapi telah dipindah milik kepada pihak ketiga yang tidak dimasukkan sebagai pihak-pihak kepada tindakan tersebut; dan (b) obligasi responden-responden di bawah seksyen 2.05 adalah hanya untuk 'cause the company to transfer'

tanah tersebut kepada perayu dan bukan secara peribadi memindah milik tanah tersebut sendiri kerana tanah tersebut tidak dimiliki oleh mereka. Rayuan ini adalah terhadap keputusan MR.

Diputuskan, sebulat suara menolak rayuan dan mengekalkan keputusan-keputusan mahkamah bawahan:

(1) Tuntutan perayu tidak berasaskan apa-apa kontrak untuk jual belik tanah tetapi atas akujanji di bawah seksyen 2.05 SSA. Tuntutannya adalah berasaskan pelanggaran akujanji oleh responden-responden untuk 'cause the company to transfer' tanah tersebut kepadanya, yang mana perayu mendakwa patut dilakukan semasa hak milik tanah tersebut diperoleh. Perayu bersetuju bahawa dia tidak berbuat apa-apa dari 2006 (apabila peguamcaranya mengeluarkan surat, bersama cek RM1 sebagai balasan, kepada responden-responden meminta mereka mematuhi seksyen 2.05) hingga 2014 (apabila peguamcaranya mengeluarkan surat tuntutan kepada responden-responden). Dia mengatakan dia menunggu untuk responden-responden memenuhi akujanji mereka. Lebih penting, apabila dia mengeluarkan notis tuntutan pada 2014, dia mengetahui bahawa taah tersebut telahpun didaftarkan atas nama Tengku Mohd Kamil dan Tengku Ramli. Namun begitu, apabila dia memfailkan tuntutannyaa dia tidak memasukkan mereka sebagai pihak-pihak. Jika dia menginginkan tanah tersebut, perayu patut telah menyaman Tengku Mohd Kamil dan Tengku Rambli. Dia tidak berbuat sedemikian. Apa yang dilakukannya adalah memohon kepada mahkamah untuk perintah agar responden-responden mendaftarkan tanah tersebut atas namanya, secara alternatif, agar mereka membayarnya ganti rugi sebagaimana ditaksirkan oleh mahkamah (lihat perenggan 23).

(2) Setelah mempertimbangkan sifat tuntutan perayu dan fakta serta keadaan kes, tuntutan perayu adalah bukan untuk mendapat balik tanah tersebut tetapi untuk pelanggaran akujanji oleh responden-responden di bawah seksyen 2.05 SSA. Tuntutannya pada dasarnya suatu tuntutan untuk pelanggaran kontrak yang mana tempoh had amsa adalah enam tahun. Tuntutannya dengan itu telah luput had masa oleh Akta Had Masa 1953 (lihat perenggan 24).]

Cases referred to

Nasri v Mesah [1971] 1 MLJ 32, FC (refd)
Ng Moh v Tan Bok Kim & Anor [1969] 1 MLJ 46, FC (refd)
Ponnusamy & Anor v Nathu Ram [1959] 1 MLJ 86, CA (refd)
Wong Yew Kwan v Wong Yu Ke & Anor [2009] 2 MLJ 672, CA (refd)

Legislation referred to

Courts of Judicature Act 1967 s 78(1)
Limitation Act 1953 ss 6, 9, 9(1)

Limitation Enactment (Cap 18) article 97
National Land Code s 340, 340(2), Form 14A
Rules of Court 2012 O 18
Rules of Supreme Court 1957 (repealed by Rules of the High Court 1980) O 15

Appeal from: Civil Appeal No W-02(NCVC)(A)-924–05 of 2016 (Court of Appeal, Putrajaya)

Harpal Singh Grewal (Archana Nair with him) (AJ Ariffin Yeo & Harpal) for the appellant.
Low Peck Lim (Ravin Woodhull with him) (KC Yap & Partners) for the respondents.

Ahmad Maarop PCA (delivering judgment of the court):

[1] This judgment is prepared pursuant to s 78(1) of the Courts of Judicature Act 1967 as our learned sister Justice Aziah Ali had since retired.

[2] In this judgment the parties will be referred to as they were in the High Court.

[3] This is an appeal by the plaintiff (appellant) against the decision of the Court of Appeal which dismissed the plaintiff's appeal against the decision of the High Court which had, on 26 April 2016, dismissed the plaintiff's claim against the first defendant and the second defendant. The plaintiff's application for leave to appeal to this court was allowed on the following questions:

1. Samada dengan Seksyen 9(1) Akta Had Masa 1953 tempoh yang berkenaan dengan tindakan untuk mendapatkan semula mana-mana tanah adalah dua belas (12) tahun dan samada tempoh ini boleh digunakan untuk semua tindakan untuk mendapatkan semula tanah tidak kira samada tindakan itu berasaskan kontrak atau sebaliknya?
(Whether by Section 9(1) of the Limitation Act, 1953 the period in relation to action to recover any land shall be twelve (12) years and whether this period applies to all actions to recover land irrespective of whether the action is founded on contract or otherwise?)

2. Samada Seksyen 9(1) Akta Had Masa 1953 menghalang penggunaan Seksyen 6(1) Akta tersebut dalam suatu tindakan untuk mendapatkan kembali tanah oleh sebab peruntukan 'Kecuali sebagaimana yang diperuntukkan kemudian dari ini' dinyatakan dalam Seksyen 6(1)?
(Whether Section 9(1) of the Limitation Act, 1953 precludes the application of Section 6(1) of the Act in an action for recovery of land by reason of the provision 'Save as hereinafter provided' expressed in Section 6(1)?.

[4] Initially, the plaintiff filed an originating summons ('OS') against the first and the second defendants seeking for the order that both the defendants register in the plaintiff's name, the property held under PN25490, Lot 7273 (formerly known as HS(015544, PT 4289), Mukim Glami Lemi, in the District of Jelebu, Negeri Sembilan. As an alternative to the aforesaid order, the plaintiff prayed that both defendants pay damages as assessed by the court, for breach of promise to register the said property in the plaintiff's name as agreed in the agreement dated 20 June 2000.

[5] The OS in the original language is as follows:

> Benarkan semua pihak berkenaan hadir di hadapan Y.A. Hakim dalam kamar pada 05-Mar-2015 pada pukul 9 pagi, bagi mendengarkan permohonan Plaintif untuk perintah-perintah berikut:
>
> (a) Bahawa kedua-dua Defendan mendaftarkan atas nama Plaintif, Toh Puan D. Heryati Binti Abdul Rahim, harta yang dimiliki di bawah PN 25490, Lot 7273 (dahulu dikenali sebagai H.S (D)5544, PT 4289) Mukim Glami Lemi, Daerah Jelebu, Negeri Sembilan.
>
> (b) Secara alternatif kepada (i) bahawa kedua-dua Defendan membayar ganti, seperti ditaksirkan oleh Mahkamah, kerana melakukan mungkir janji untuk mendaftar harta tersebut atas nama Plaintif seperti dipersetujui dalam perjanjian bertarikh 20hb Jun 2000.
>
> (c) Kedua-dua Defendan membayar faedah atas ganti rugi yang ditaksirkan menurut (ii) di atas, atas kadar 5% setahun daripada tarikh Saman Pemula ini sehingga penyelesaian penuh.
>
> (d) Perintah-Perintah tambahan atau selanjutnya seperti dianggapkan munasabah oleh Mahkamah yang mulia ini.
>
> (e) Bahawa Plaintif diberikan kebenaran untuk memohon untuk relif tambahan.

[6] In the High Court, the defendants applied under O 18 of the Rules of Court 2012 ('the ROC') for the OS to be struck out on several grounds of irregularities which included the following — plaintiff should have filed a writ action since there were serious issues to be tried; that the plaintiff was guilty of laches and that the plaintiff's claim was statute barred. The High Court dismissed that application but ordered the OS to be converted to a writ action which went on for full trial, in which only the plaintiff and the first defendant testified.

[7] The background facts leading to the plaintiff's case are these. The plaintiff was the former wife of the late Tun Abdul Ghaffar bin Baba. Both of them were the only two shareholders of a company known as Zamrudvest Sdn Bhd ('the company'). The company was the holder of an EON Franchise. Out of the 100,000 shares in the company, Tun Ghaffar held 99,994 shares, and the

plaintiff held the remaining six shares. The company had applied to the state authority for alienation of a parcel of land situated in Jelebu, Negeri Sembilan ('the land'). A

[8] On 20 June 2000, Tun Ghaffar and the plaintiff (as vendors) entered into a share sale agreement ('SSA') with the defendants (as purchasers) to sell 60% of the shares in the company to the defendants. The first defendant and the second defendant were then husband and wife. The proportion of the shares sold is as follows: B

1. Tun Abdul Ghaffar bin Baba – 59,994 shares C
2. The plaintiff – 6 shares

[9] As stated in the agreement, these shares were sold for RM300,000.

[10] The SSA contains a special covenant which provides: D

> Section 2.05 Special Covenant
>
> In consideration of the Vendor agreeing to sell the Sale Share to the Purchaser and in consideration of the purchase consideration payable by D. Heryati Binti Abdul Rahim of the sum of Ringgit Malaysia One (RM1) only the Purchaser hereby agrees to cause the Company to transfer the said Property to D. Heryati Binti Abdul Rahim absolutely. E

[11] It is this cl 2.05 which formed the plank of the plaintiff's claim against the defendants. The plaintiff contended that the company had applied for alienation of the land. At the time when the SSA was entered into, the land office had yet to issue the title to the land. It is the plaintiff's case that the SSA did not include the land. To specifically exclude the land from the SSA, the plaintiff testified that a specific covenant was inserted under section 2.05 of the SSA. According to the plaintiff, section 2.05 was to be read as an undertaking made by the defendants to cause the company to transfer the land to the plaintiff upon the issuance of a title to the land in consideration of payment by her of the sum of RM1. However, nothing was done by the defendants in respect of the transfer. The plaintiff wrote to the defendants requesting the defendants to transfer the land to the plaintiff as soon as the land office issued the land title to the company. On 8 December 2005, the plaintiff conducted a private search at the Jelebu Land Office and discovered that the land had been registered in the name of the company, and that the land was then transferred to the first defendant. In fact title to the land was issued to the company on 9 March 2003. The plaintiff then caused a letter dated 12 January 2006 to be issued by her solicitors (with a cheque of RM1 enclosed as consideration) for the transfer of the land to her pursuant to the special covenant under the SSA. When there was no compliance, she caused a letter of demand dated 29 September 2014 to be issued, requesting for section 2.05 of the SSA to be F G H I

complied with. It must be added that in her evidence, the plaintiff admitted that at the time that letter was issued, she had knowledge that the land had been transferred to Tengku Mohd Kamil and Tengku Ramli. In fact the land was transferred to Tengku Mohd Kamil bin Tengku Shahrudin Shah (1/2 *bahagian*) and Tengku Ramli bin Tengku Shahrudin (1/2 *bahagian*) by the first defendant on 10 April 2012. The plaintiff also agreed that on 10 November 2014, she lodged a private caveat. There was still no compliance by the defendants. So, on 6 February 2015, the plaintiff filed the OS.

[12] The first defendant testified that sometime towards the end of 2002, Tun Ghaffar had some personal problems with the plaintiff, and changed his mind about transferring the land to the plaintiff. Instead, Tun Ghaffar agreed that the land be transferred to the first defendant to settle some of the personal loans given to the former by the latter. On 9 March 2003, title to the land was issued to the company. The plaintiff and Tun Ghaffar were divorced on 12 March 2003. Tun Ghaffar passed away on 23 April 2006. The defendants' defence, amongst others, include the plea that the plaintiff's claim was barred by statute because when she filed her action, more than six years had lapsed since she knew the land was transferred to the first defendant in 2003 or thereabout.

[13] In the High Court, two of the revised agreed issues were as follows:

1. Whether the Plaintiff's claim against the defendants based on SPA dated 20 June 2000, to transfer the Jelebu land belonging to Zamrudvest Sdn Bhd, is subject to limitation, if so, whether the Plaintiff's claim should be dismissed?

2. Whether the Plaintiff's claim against the defendants is for recovery of land, if it is for recovery land, the limitation period is 12 years, or whether the Plaintiff's claim is for breach of contract, if so, the limitation period shall be 6 years from date of alleged breach.

[14] The High Court found, upon examining the nature of the plaintiff's cause of action, that the plaintiff's cause of action against the defendants was based on the breach by the defendants of their contractual obligation under section 2.05 of the SSA to 'cause the company to transfer' the land to the plaintiff. This is what the learned judge of the High Court said in her grounds of judgment:

> 20. It is not disputed that the plaintiff's claim is grounded on section 2.05 – the special covenant.
>
> 21. Upon a close examination of the special covenant it is to be noted that the defendants' obligation as contained in the special covenant is to 'cause the Company to transfer the said Property to D. Heryati bt. Abdul Rahim'.
>
> 22. In my view, the plaintiff's cause of action against the defendants is grounded on

contract because the defendants' obligation is to only cause the company to transfer the property and not to transfer the property to the plaintiff.

23. It was not possible for the defendants to transfer the property to the plaintiff because they were at the material time not the registered proprietors of the Jelebu Land. The plaintiff's claim against the defendants cannot be for recovery of land because of this very reason: the property was never theirs to transfer at the material time. The defendants' sole obligation under the special covenant was to take action and to prevail upon the company to transfer the property to the plaintiff. This is nothing but a contractual obligation. By the defendants' failure to do so, they had breached their contractual obligation.

24. The plaintiff's claim for recovery of land it at all, should be against the company.

Has limitation set in?

25. Section 6 of the Limitation Act provides for a period of six years to initiate an action for breach of contract.

26. The plaintiff by her own evidence, discovered that the company had transferred the Jelebu Land to D1 when she conducted a land search on 8 December 2005. The legal notice dated 12 January 2006 was then issued by her lawyer.

27. By filing this suit in 2015 the plaintiff is clearly out of time and her claim is time barred as limitation has set in by virtue of s 6 of the Limitation Act.

28. Accordingly her claim is dismissed with costs.

[15] The Court of Appeal upheld the High Court's finding that the plaintiff's claim was for breach of agreement. The Court of Appeal declined to accept the plaintiff's contention that her claim was for recovery of land. In its judgment, the Court of Appeal said:

[27] ... In our observation the claim made by the appellant in this case cannot be a claim for recovery of land. We say so for the following reasons.

[28] As the facts revealed, at the time the OS was filed by the appellant on 6 February 2015 the land was no longer in the name of the first or the second respondents. This fact is also known to the appellant as the search result obtained revealed who the registered owner was. That notwithstanding, the appellant chose to stake her claim against the first and the second defendants for a breach of undertaking made in section 2.05. Whereas, a claim for recovery of land may only be made against the party in whose possession the land is or owned as demonstrated by the decided cases which we have alluded to in *Ponnusamy v Nathu Ram*, *Nasri v Mesah* as well as *Economic Development (Low Cost Houses) Sdn Bhd v Majlis Perbandaran Seberang Perai*. The prayer sought against the respondents for an order that the land be transferred to the appellant cannot be granted in any event, without citing the registered owner as a party. That being the position we find it difficult to accept the argument of the appellant that her claim was for recovery of the land. If the claim is to recover the land the right party has to be cited. From the way the claim is taken it is clear that it cannot be for recovery of the land.

A [29] The relationship between the appellant with the respondents at best is a contractual undertaking. The undertaking made by the respondents under the SSA is to cause the land to be transferred to the appellant pursuant to section 2.05. It is an undertaking made by a person who was not the land owner to cause the land owner to do the transfer. Against this backdrop, there is no obligation per se
B imposed on the respondents to transfer the land to the appellant under the SSA. In fact no such obligation may be imposed since the company which was the owner of the land is distinct and separate from the respondents.

[30] In all the above circumstances we do not agree with the appellant that her claim against the respondents was for recovery of the land. We find all the cases cited
C before us differ from the facts of the present appeal. In all those cases the claim made by the claimants are all against land owners who had contracted to transfer the land either by way of sale and purchase agreement as in the case of *Economic Development (Low Cost Houses)* which too involved an agreement to transfer that land in question. It is not so in the appeal before us. There was no promise to transfer the land by the respondents made herein. Furthermore in *Ponnusamy v Nathu ram* as
D well as *Nasri v Mesah*, the plaintiffs were all in possession of the land, or the physical title of it. What was left to be done was the registration of the transfer. The defendants in all these cases were under obligations to transfer the land to the plaintiff. That was the reason why the claims in these cases were construed as claims for recovery of land.

E [31] Whereas, in the present case the obligation of the respondents under the SSA was purely to cause the transfer of the land which in the first place did not belong to them. Their obligations was not to transfer the land to the appellant but only to undertake or to cause the transfer which is a totally different obligation found all in the decided cases on recovery of land which we have alluded to earlier. The prayer by
F the appellant for the respondents to transfer the land would have been unsustainable in any event.

[16] In his oral submission before us, summarising his written submission filed earlier, learned counsel for the plaintiff contended that the learned judge
G of the High Court erred in her finding that the plaintiff's claim (whose cause of action was grounded on a breach of contract) was barred by s 6 of the Limitation Act 1953 (Act 254). Learned counsel submitted that the learned judge of the High Court (whose findings on the issue of limitation was upheld by the Court of Appeal) failed to take into account the facts and the evidence
H before her as well as the law. He contended that there was insufficient or improper judicial appreciation of facts leading to the filing of the plaintiff's claim. According to him, on 15 December 2003, the plaintiff wrote to the first defendant and put the first defendant on notice that she had made certain payment to the company, and requested the first defendant to transfer the land
I within one month from the date the land was transferred to the company. So, from the year 2003, the plaintiff had already registered, by way of notice, her intention to have the land transferred to her. There was no reply to that letter. The plaintiff then caused a letter dated 12 January 2006 to be issued by her solicitors (with a cheque of RM1 enclosed as consideration) for the transfer of

the land to her. In response, on 20 January 2006, the defendants requested for a copy of the SSA, and also demanded payment of RM216,049.52 which the defendants claimed had been advanced to the plaintiff, which sum learned counsel for the plaintiff argued was irrelevant to the plaintiff's claim. On 6 February 2006, the plaintiff's solicitors forwarded a copy of the SSA, and gave notice that unless the memorandum of transfer (Form 14A) was forwarded within seven days, legal action would follow. There was no response to that demand, and thereafter the plaintiff through her solicitors, again requested the defendants to take steps to retransfer the land to the plaintiff. According to the learned counsel for the plaintiff, the notice to retransfer was issued to the defendants, because by then, the first defendant had transferred the land to himself. This was evident from a land search dated 8 December 2005 which revealed that the transfer to the first defendant was registered on 19 February 2004. The defendants' solicitors responded in a letter dated 8 October 2014 again denying knowledge of the SSA and again requested a copy of the SSA. The defendants' solicitors also raised an issue regarding repayment of RM150,000 advanced to the plaintiff in connection with the sale of a car by the plaintiff to the defendants, which according to the plaintiff's counsel, was irrelevant to the plaintiff's claim. The plaintiff's solicitors replied to this letter, and expressed the plaintiff's disappointment over the defendant's denial of the SSA, and once again a copy of the SSA and a copy of the police report lodged by the plaintiff on 8 December 2005 were forwarded to the defendants' solicitors. In the light of all those background facts, learned counsel for the plaintiff contended that the plaintiff's claim was an action to recover land and the limitation period was 12 years, and that in the present case the action was filed within 12 years from the date the first defendant transferred the land to himself. In support of his submission, learned counsel relied on *Nasri v Mesah* [1971] 1 MLJ 32, *Ponnusamy & Anor v Nathu Ram* [1959] 1 MLJ 86, and *Ng Moh v Tan Bok Kim & Anor* [1969] 1 MLJ 46.

[17] The substance of the submission by learned counsel for the defendants is as follows. The two leave questions which concerned recovery of land became academic. This was because at the time the plaintiff filed the OS on 6 February 2015, she knew that the registered proprietors of the land since 10 April 2012 was Tengku Kamil and Tengku Ramli. Learned counsel contended that what the plaintiff made out as an action for recovery of land was actually an action for damages. Tengku Kamil and Tengku Ramli had not been sued as parties in the High Court action. Section 340 of the National Land Code immunised their title as registered proprietors from impeachment saved in the limited circumstances housed under s 340(2) of the same Code. In support learned counsel refer to *Wong Yew Kwan v Wong Yu Ke & Anor* [2009] 2 MLJ 672 where the Court of Appeal said:

> (1) (per Gopal Sri Ram JCA) The learned judge was entirely correct in striking out the appellant's pleading as being plainly and obviously unsustainable.

> Section 340(1) of the NLC immunises the title of a registered proprietor from impeachment save in the limited circumstances that are housed in sub-s (2). Thus, mere allegations of fraud are insufficient to constitute a pleaded case of fraud. Even if the registered proprietor acquired his title unlawfully, that is to say, in breach of written law, he may nevertheless assert it against the whole world until proceedings are brought to remove him from the register as articulated in *Teh Bee v Maruthamuthu* [1977] 2 MLJ 7 ...

[18] Submitting further, learned counsel argued that s 9 of Act 254 was clear that it was only for recovery of land. That provision could not be interpolated to extend to other cases. For the plaintiff's case to come within the ambit of s 9, the land must be with the defendants.

THE DECISION OF THIS COURT

[19] Limitation period for action to recover land is twelve years as provided under s 9(1) of Act 254 which is as follows:

> 9(1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

[20] Learned counsel from the plaintiff relied on the following passage in the judgment of Thomson CJ in *Ponnusamy & Anor v Nathu Ram* which was subsequently quoted by the Federal Court in *Nasri v Mesah*:

> By s 9, however, it is expressly provided that, subject to certain exceptions which are not relevant here, the period in relation *to actions to recover any land shall be* 12 years and it is clear that this applies to *all actions to recover land irrespective of whether they are founded on contract or otherwise.* (Emphasis added.)

[21] So, the limitation period in relation to actions to recover any land shall be 12 years and this applies to all actions to recover land irrespective of whether they are founded on contract or otherwise. However, the key qualifying words in the above passage are 'actions to recover any land' and 'all actions to recover land'. Thus, the question in this appeal is whether the plaintiff's action is an action to recover land? The answer depends on the consideration of the nature of the claim. This is illustrated in the judgment of the Court of Appeal in *Ponnusamy* which was cited with approval by the Federal Court in *Nasri v Mesah*. In *Ponnusamy*, the facts revealed in the head notes are these. In August 1944, respondent sold his land to Naina and executed a transfer in statutory form. Naina entered into possession but did not register the transfer. He died on 11 February 1949 and thereupon the transfer became unregistrable. The appellants (who were executors of Naina's will) brought an action on 1 December 1956 claiming declaration of title to the land and an order on the registering authority to register appellants as proprietors. The respondent

pleaded limitation as one of his grounds of defence which point of law was disposed of by the trial judge under O 15 of the Rules of Supreme Court 1957. The trial judge held: (a) that the action was for a declaration of title and was governed by art 97 of the Limitation Enactment (Cap 18); (b) having regard to the defence, the respondent had taken steps to challenge Naina's rights; and (c) the date of Naina's death, ie 11 February 1949, was the crucial date when the right to sue accrued, but, by reason of the moratorium, limitation ran from 1 October 1949 when it was lifted; and (d) the action having been commenced more than six years after that date, it was barred by limitation. The appellants appealed.

[22] In delivering judgment of the Court of Appeal, Thomson CJ said:

> The plaintiffs (the present appellants) are the executors of the estate of one Naina who died on the 11 of February 1949 and *the defendant at all material times was and still is the registered proprietor of the piece of land* in the township of Taiping which formed the subject matter of the action. On or about 24 August, 1944, which it is to be observed was during the Japanese occupation, the defendant sold the land in question to the deceased for a sum of $10,000, executed a memorandum of transfer in accordance with the provisions of the Land Code and handed this transfer together with the grant to the deceased. For reasons which are not altogether clear, and with which in any event we are not here concerned, the transfer was not immediately presented for registration and after the end of the war it became incapable of being presented by reason of the legislation which occupied such a great portion of our time in these courts for a number of years recently. Then the purchaser died. There was considerable delay in extracting probate of his will and the present proceedings were not commenced until 23rd November, 1956. Up till that date the defendant had refused to do anything of any sort in connection with the sale of the land to the deceased *although the deceased had gone into and remained in possession*.
>
> The plaintiffs in their plaint related the facts which I have just set out and concluded by asking in the first place for a declaration that the executors were entitled to the land in question and in the second place for an order in terms of the Land Code that the proper Registering authority do make such memorials in the Register and issue Document of Title No 4886 for Lot No 298 in the township of Taiping as may be necessary to register the testate (presumably they mean the deceased) as the proprietor thereof.
>
> To my *mind the whole appeal stands or falls according to the nature of the claim and in my opinion the claim constitutes an action to recover land.*
>
> I do not propose to repeat what I have said on previous occasions regarding the local land laws as, for example, in the case of *Bachan Singh v Mahinder Kaur & Ors* [1956] 1 MLJ 97. I think, however, that it is abundantly clear that by reason of the provisions of the Land Code and particularly by reason of ss 42–43 the question of whether the deceased ever had any rights in rem as distinct from rights ad rem does not arise at this stage for *it is clear that the whole right, title and interest in the land are still in the defendant for the reason (and it is a very simple reason) that he is the registered proprietor. He is on the register and therefore the whole right, title and interest in the land*

are vested in him. As I put it colloquially this morning in the course of discussion with counsel, what the plaintiffs are doing is this. They are coming to the Court and saying 'we are entitled to this land and we want this land.' And if the Court is in agreement with them that they are entitled to the land and should be given the land, one appropriate way of giving it to them, in view of the provisions of the Land Code, is to make the declaration asked for and the consequential order on the registering authority. That reasoning leads me to the conclusion that this is an action to recover land within the meaning of section 9 of the Limitation Ordinance (No 4 of 1953). I find support for the view in the case of *Williams v Thomas* [1909] 1 Ch 713. In that case the question related to certain rights of a dowress in land and is not, I think, very relevant here, but in the course of his judgment in the Court of Appeal Buckley, LJ, discussed the question of what was an action to recover land for the purposes of the Real Property Limitation Act, 1833, and said (at p 730):

> It has been argued, and, I think, successfully, that while on the one hand the expression 'to recover any land' in section 2 of the Act of 1833 does not mean regain something which the plaintiff previously had and has lost, but means 'obtain any land by judgment of the Court' yet it is not limited to the meaning obtain possession of any land by judgment of the Court.

What in effect the plaintiffs in the present case are seeking to do is to 'obtain ... land by judgment of the Court'.

Having reached the conclusion that this is an action to recover land it seems to me impossible to avoid the further conclusion that the case falls within section 9(1) of the Limitation Ordinance. Section 6(1) of the Ordinance provides that in the case of actions founded on a contract the period of limitation shall be six years but that provision is expressly stated to be 'save as hereinafter provided'. By section 9, however, it is expressly provided that, subject to certain exceptions which are not relevant here, the period in relation to actions to recover any land shall be 12 years and it is clear that this applies to all actions to recover land irrespective of whether they are founded on contract or otherwise.

[23] Reverting to the present appeal, the plaintiff's claim is not based on any contract for the sale and purchase of land. Her claim was based on an undertaking under section 2.05 of the SSA. Her claim was based on the breach of the undertaking by the defendants thereunder to 'cause the company to transfer' the land to the plaintiff, which the plaintiff claimed was to be done when the title to the land was obtained. At the time when the SSA was entered into, the land office had yet to issue the title to the land. The plaintiff made a private land search on 8 December 2005. The land had been registered in the company's name and that it was then transferred to the first defendant. The plaintiff then caused a letter dated 12 January 2006 to be issued by her solicitors (with a cheque of RM1 enclosed as consideration) for the transfer of the land to her pursuant to the special covenant under the SSA. The plaintiff's notice of demand was issued in 2014. When that notice was issued she knew that the land had been transferred to Tengku Mohd Kamil and Tengku Ramli. The plaintiff agreed that she did not do anything from 2006–2014. She said

she was waiting for the defendants to fulfil their undertaking. More importantly, when she issued the notice of demand in 2014, she knew that the land had been registered in the names of Tengku Mohd Kamil and Tengku Ramli. Despite this, when she filed her claim she did not cite Tengku Mohd Kamil and Tengku Ramli as parties. If she wanted the land she should have sued Tengku Mohd Kamil and Tengku Ramli. She did not do so. What she did was to file the OS seeking an order that the defendants register the land in her name. Alternatively, she prayed for the order that the defendants pay damages to her which was to be assessed by the court.

[24] Upon considering the nature of the plaintiff's claim and the facts and circumstances of this case, we conclude that the plaintiff's claim is not a claim for recovery of land. Her claim was for the breach of the undertaking by the defendants under section 2.05 of the SSA. Her claim is in effect a claim for breach of contract for which the limitation period is six years. Her claim is therefore barred by the Limitation Act 1953.

[25] In the result, we dismiss the plaintiff's appeal with costs. The decisions of the courts below are affirmed.

[26] We find no necessity to answer the question of law on which leave to appeal was granted.

Appeal dismissed with costs.

Reported by Ashok Kumar